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No. 80-2100

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

QUENTIN ROGERS, et al.,
Appellants,

versus

HERMAN LODGE, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICI CURIAE GEORGIA ASSOCIATION OF BLACK ELECTED OFFICIALS, GEORGIA COALITION OF BLACK WOMEN, INC., LEAGUE OF WOMEN VOTERS OF GEORGIA, INC., MARTIN LUTHER KING, JR. CENTER FOR NONVIOLENT SOCIAL CHANGE, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, NATIONAL BAR ASSOCIATION, SOUTHERN REGIONAL COUNCIL, SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT, AND VOTER EDUCATION PROJECT, INC.

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Come now the above listed organizations, by counsel, and move the Court for leave to file a brief *amici curiae*, in support of the Appellees in the above-styled cause.[1]

[1] Counsel for the Appellants has not given consent to the filing of this brief.

The Georgia Association of Black Elected Officials is an organization of over 500 black elected officials in the State of Georgia. It is deeply concerned with the continuing use in the State of election procedures which perpetuate the effects of past discrimination in voting. It is acutely aware of the special barriers facing the minority community in electing candidates of its choice to office, and promotes the equal access of all citizens to full political participation.

The Georgia Coalition of Black Women, Inc., is an organization representing the interests of black women in 69 counties in Georgia. It believes that the fundamentals of democratic government can be realized only if all members of society participate in the electorate without distinction based upon sex, race, or ethnic origin. It advocates the disestablishment of structural barriers which impede such participation.

The League of Women Voters of Georgia, Inc. is a statewide, non-profit, non-partisan organization of over 2,000 members throughout the State of Georgia dedicated to informing and educating voters and protecting citizens' rights. It believes in an open governmental system that is representative, accountable and responsive to all citizens and that protects individual liberties established under the Constitution. In recent months its activities have included closely monitoring the redistricting process in Georgia and working for the extension of the Voting Rights Act. It views its interest in this case as an extension of its action to protect voting rights.

The Martin Luther King, Jr. Center for Nonviolent Social Change in Atlanta, Georgia was founded upon

the teachings and example of the late Martin Luther King, Jr. One of its goals is promoting social change through peaceful, non-violent means. This goal can be significantly enhanced through establishment of election practices which permit and encourage full and free participation by all citizens regardless of race.

The National Association for the Advancement of Colored People is a membership organization with more than 12,500 members in Georgia, one-half million members nationwide and branches and affiliates in all 50 states. The N.A.A.C.P. was founded in 1909 to confront and eradicate racial discrimination in all its forms. Over the years it has expended a great deal of its resources, and filed numerous law suits, in attempting to secure the right to vote for minorities and to have their votes exercised in a meaningful fashion. N.A.A.C.P. members in all 50 states have a vital interest in this case, and therefore the N.A.A.C.P.'s own vital interests are directly involved.

The National Bar Association is a membership organization composed of members of the bars of the various states, including the bar of Georgia. It advocates racial justice and fairness in the bar, the judicial system and in all institutions of American government. It believes that §2 is an important safeguard against discrimination in the electorate and should be construed in this case broadly and consistently with legislative policy.

The Southern Regional Council is the South's oldest biracial organization that has worked for equal opportunity among all peoples of the region through research, technical assistance, education, and advocacy.

Since its beginnings in 1944, the Council has had a consistent and primary concern for the right to vote of all citizens in the region. The organization's first major report concerned remaining legal barriers to the right to vote after the Supreme Court's decision in *Smith v. Allright*. In the 1960's, the Council created the Voter Education Project as a means to carry out its work in the field of voting and continues to operate several projects carrying out research and technical assistance relating to the voting rights of all Southerners.

The Southwest Voter Registration Education Project is a non-partisan, privately funded, tax exempt organization created in 1975 for the purpose of increasing voter registration of Spanish origin and Indian American citizens. It has conducted over 400 voter registration drives in Texas, California, Arizona, New Mexico, Colorado, Utah and Oklahoma. S.V.R.E.P. also litigates cases involving the elective franchise under the Fourteenth and Fifteenth Amendments, and particularly the Voting Rights Act of 1965. This case may have ramifications for other litigation involving the use of at-large elections to dilute the voting strength of Spanish origin and Indian Americans. Traditionally, at-large elections have had an adverse effect on the registration and participation rates of minorities in the Southwest. For these reasons, S.V.R.E.P. has a special interest in the outcome of this case.

The Voter Education Projects, Inc. in Atlanta, Georgia, is a publicly supported, non-profit, tax exempt organization. Its main goal is to foster minority political participation at all levels in order to build a more democratic and representative system of government. It has been the leading organization working full time

in the South to implement the Voting Rights Act through programs of voter registration and citizenship education. Since 1965, it has directed financial assistance to over 1,700 local southern organizations engaged in non-partisan voter registration and citizenship education activities. It is vitally concerned with the outcome of this case because of its impact upon minority political participation.

The case *sub judice* may have ramifications for other litigation in jurisdictions where the local governing body utilizes at-large elections, numbered posts, or majority vote requirements, and particularly in jurisdictions not covered by §5 of the Voting Rights Act of 1965 which may adopt such procedures in the future. Counsel for the parties herein may not focus on such issues because they do not directly affect them.

Because of the concerns of *amici* over equality in voting, and because counsel for the parties may not focus on the issues mentioned above, *amici* seek leave to file this Brief of *Amici Curiae*.

Respectfully submitted,

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INTERESTS OF AMICI CURIAE

The interests of *amici curiae* are set forth in the motion for leave to file this brief, *supra*, p. i.

SUMMARY OF ARGUMENT

This Court, pursuant to its own practice, is obligated to decide this case on statutory grounds if possible. The judgment below should be affirmed on the basis that the challenged voting procedures in Burke County, Georgia, have a discriminatory effect in violation of §2 of the Voting Rights Act of 1965, 42 U.S.C. §1973.

Congress clearly has the power to go beyond the commands of the Constitution in fashioning remedies for discrimination in voting. The scope of §2, however, has never been resolved by a majority of this Court.

The legislative history, the language of the statute and the entire structure of the Voting Rights Act show that Congress intended §2 at a minimum to reach voting practices which perpetuate the effects of past discrimination. Even were the language of §2 ambiguous, this Court is obligated to interpret the statute broadly and in a manner which best effectuates the underlying intent of Congress in enacting the Act.

The factual findings of the two courts below demonstrate that at-large elections, numbered posts and the majority vote requirement, perpetuate the effects of past discrimination in voting in Burke County. Unless this Court deems such findings to be clearly erroneous, it should affirm the judgment of the lower courts pursuant to 42 U.S.C. §1973.

ARGUMENT

I.

SECTION 2 OF THE VOTING RIGHTS ACT OF 1965, 42 U.S.C. §1973, PROHIBITS THE USE OF AT-LARGE ELECTIONS, NUMBERED POSTS AND A MAJORITY VOTE REQUIREMENT IN BURKE COUNTY, GEORGIA, BECAUSE OF THEIR DISCRIMINATORY EFFECT.

A. This Case Should Be Decided on Statutory Grounds If Possible.

In cases such as this which present both constitutional and statutory issues,[1] the Court is obligated by its own practice "not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944). The rule should be applied here where the record shows that at-large elections, numbered posts and a majority vote requirement for election of the Burke County, Georgia, Board of Commissioners have a racially discriminatory effect in violation of §2

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[1] The Appellees, plaintiffs below, relied upon the First, Thirteenth, Fourteenth and Fifteenth Amendments, as well as 42 U.S.C. §§1971 and 1973. Joint Appendix, 14. Section 1973 provides: "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title."

of the Voting Rights Act of 1965, 42 U.S.C. §1973.[2] In any event, the Court should closely "consider whether the statutory grounds might be dispositive," and resolve the case on that basis, if possible. *New York City Transit Authority v. Beazer*, 440 U.S. 568, 582 (1979).

B. No Majority of This Court Has Ever Decided the Scope of §2.

No majority of this Court has ever decided whether §2 prohibits election practices which have a discriminatory effect in the absence of proof of invidious purpose. The plurality in *City of Mobile v. Bolden*, 446 U.S. 55, 61 (1980), in concluding that discriminatory purpose was an essential element of a constitutional violation, rejected the plaintiffs' claim that §1973 contained a different standard of proof than the Constitution; but, no majority view was expressed.[3]

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[2] *Amici* believe the lower court was correct in finding purposeful discrimination in use of at-large elections in Burke County in violation of the Fourteenth and Fifteenth Amendments. However, for the reasons set out *infra*, it is unnecessary for this Court to reach the constitutional issues.

[3] The plurality assumed that a private right of action exists to enforce §2, *City of Mobile*, *supra*, 446 U.S. at 60, n. 8, citing Allen v. Board of Elections, 393 U.S. 544 (1969), which held that a private cause of action exists to enforce §5 of the Act. The availability of private relief under §2 is supported by other decisions of this Court on implied causes of action, Cannon v. University of Chicago, 441 U.S. 677 (1979), and Cort v. Ash, 422 U.S. 66 (1975), also cited in *City of Mobile*, *supra*, as well as the legislative history.

The House Report accompanying the 1965 bill described the purpose of §2 as "grant[ing] to all citizens of the United States a *right* to be free from [racially discriminatory voting practices]." House Rep. No. 439, 89th Cong., 1st Sess., (1965), U.S. Code

Justices White, Blackmun and Stevens did not discuss the statutory issue. Justices Marshall and Brennan expressed the view that vote dilution was prohibited irrespective of intent. *City of Mobile, supra*, 446 U.S. at 105 and n.2, 94. Thus, the opinions do not decide the question of proper application of §2 to this case.[4]

Cong. & Admin. News, 1965, 2437, 2454 (emphasis added). The Act expressly authorized the Attorney General to enforce §2. 42 U.S.C. §1973j(d). The Attorney General was the only person expressly authorized to enforce §5 as well, but the Supreme Court nevertheless held that a private cause of action based on §5 was inferred in the statute. *Allen v. State Board of Elections, supra*. By direct analogy, *Allen* had to mean there was a private cause of action under §2 also.

Congress removed all doubt in 1975, when it substituted "Attorney General or an aggrieved person" for "Attorney General" everywhere it appeared in §3, the so-called "pocket trigger" aimed at jurisdictions or "pockets of discrimination," not covered by §§4 and 5. House Rep. No. 439, *supra*, U.S. Code Cong. & Admin. News, 1965 2454. The Senate Report explained that this change was intended to create a dual enforcement mechanism, that is, "to afford to private parties the same remedies which Section 3 now affords only to the Attorney General." S. Rep. No. 94-295, 94th Cong., 1st Sess., 806 (1975). The proponents of this amendment made it clear that a private action was to be available under §2 for the purpose of providing the special §3 remedies. Congressman Drinan, for example, noted that private actions could be "based . . . upon statutes pursuant to [the Fourteenth and Fifteenth Amendments], such as 42 U.S.C. §§1971, 1973, 1983." 121 Cong. Rec. H4734 (daily ed., June 2, 1975).

[4] The plurality also held that vote dilution was prohibited by the Fourteenth, but not the Fifteenth, Amendment. *City of Mobile, supra*, 446 U.S. at 65. A majority of the Court, however, apparently believes that dilution claims may be predicated upon either provision. *Ibid.*, at 129 n.26 (dissenting opinion of Justice Marshall).

Amici contend that the legislative history, language and structure of the Voting Rights Act, including its extensions and amendments, all demonstrate that §2, like §5, contains an effect standard. As a consequence, at-large elections, numbered posts and the majority vote requirement in Burke County are unlawful without regard to whether they may have been adopted, or are being maintained, purposefully to discriminate against racial minorities.

C. Congress Has Power To Go Beyond the Prohibitions of the Constitution to Remedy Discrimination in Voting.

Congress has power to pass legislation that goes beyond the commands of the Fourteenth and Fifteenth Amendments and ban discrimination in voting that has a discriminatory effect. In *City of Rome v. United States*, 556 U.S. 156, 177 (1980), construing §5 of the Act, this Court held "that under §2 of the Fifteenth Amendment Congress may prohibit practices that in and of themselves do not violate §1 of the Amendment," and that §5's "ban on electoral changes that

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It is unnecessary to resolve the "ambiguity" of the plurality opinion over the reach of the Fifteenth Amendment and §2, see United States v. Uvalde Consolidated Independent School District, 625 F.2d 547, 552 (5th Cir. 1980), since Congress invoked its Fourteenth Amendment powers in amending and extending the Voting Rights Act in 1975. See 42 U.S.C. §1973b(f); H.R. Rep. No. 94-196, 94th Cong., 1st Sess. (1975); S. Rep. No. 94-295, *supra*. Section 2, presently based upon both the Fourteenth and Fifteenth Amendments, clearly reaches claims of vote dilution.

are discriminatory in effect" was a proper exercise of congressional power.[8]

D. Congress Intended for §2 to Embody a Purpose or Effect Standard.

The proceedings in the House and Senate show that in enacting the Voting Rights Act of 1965, Congress was particularly concerned with eradicating the continuing effects of past discrimination in voting, and

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[8] Congress has statutorily proscribed conduct in a variety of other contexts that would not be unconstitutional absent proof of discriminatory purpose. Literacy tests have been eliminated by Congress, Oregon v. Mitchell, 400 U.S. 112 (1970), even though the identical tests may be entirely constitutional. Lassiter v. Northampton County Board of Education, 360 U.S. 45 (1959). Employees of local government must show "purposeful" discrimination to prevail in an employment discrimination case predicated on the Fifth or Fourteenth Amendments, Washington v. Davis, 426 U.S. 229 (1976), but no such showing must be made in a Title VII case against the same municipal or state defendant. Dothard v. Rawlinson, 433 U.S. 321 (1977). Congress can go so far as to enact legislation pursuant to the Fourteenth Amendment which eliminates protections otherwise afforded the states under the Tenth or Eleventh Amendments. *Compare* National League of Cities v. Usery, 426 U.S. 833 (1976), with Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). More recently, this Court approved the "minority business enterprise" provision of the Public Works Employment Act of 1977 after concluding that "[o]ur cases . . . confirm that congressional authority extends beyond the prohibition of purposeful discrimination to encompass state action that has discriminatory impact perpetuating the effects of past discrimination." Fullilove v. Klutznick, 448 U.S. 448, 477 (1980). Section 5 of the Voting Rights Act of 1965 is undoubtedly the premier example of an act of Congress pursuant to the Fourteenth and Fifteenth Amendments that exceeds the impact of those amendments alone.

not merely direct, purposeful discrimination by local jurisdictions. Senator Javits explained that the Act

> was designed not only to correct an active history of discrimination, the denying to Negroes of the right to register and vote, but also to deal with the accumulation of discrimination. . . . The bill would attempt to do something about accumulated wrongs and the continuance of the wrongs.[6]

More specifically, the concern of Congress over the continuing effects, or "wrongs," of past discrimination was the very basis for banning literacy tests and poll taxes.[7]

This Court has explicitly recognized the intent of Congress in the Act to ban election practices which have the effect of denying the right to vote. In *Gaston County v. United States*, 395 U.S. 285 (1969), the Court blocked the use of literacy tests in Gaston County, North Carolina, finding that it was "appropriate" in an action to enforce §4(a) of the Act "to consider whether a literacy or educational requirement has the 'effect of denying . . . the right to vote on account of race or color.'" *Ibid.*, 395 U.S. at 293. The Court relied solely upon the effect of the test, accepting as true — but regarding as irrelevant — the claims of the county that it had administered its election laws "in a fair and impartial manner." *Ibid.*, 395

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[6] 111 Cong. Rec. 8295.

[7] House Rep. No. 439, *supra*, 14-6, 21-2; Senate Report No. 162, Part 3, 89th Cong., 1st Sess., 15-6, 32-4 (1965); 111 Cong. Rec. 8295 (Sen. Javits), 9795, 11401, 11467 (Sen. Hart), 15647 (Rep. Cellar), 15725 (Rep. Burke), 15991-92 (Rep. Tunney), and 16214-16 (Rep. Roosevelt).

U.S. at 296. " 'Impartial' administration of the literacy test today would serve only to perpetuate these [educational] inequalities in a different form." *Ibid.* The literacy requirement was held to be unenforceable under §4(a).

In enacting §2, Congress similarly intended to render unlawful voting procedures other than literacy tests and poll taxes whose discriminatory effects are demonstrated.

(1) The Legislative History of §2 Shows the Intent of Congress to Proscribe Election Procedures Which Continue to Have Discriminatory Effects.

Attorney General Katzenbach testified before Congress during the hearings on the Voting Rights Act of 1965 and explained that §2 would ban "any kind of practice . . . if its purpose or effect was to deny or abridge the right to vote on account of race or color." *See Allen v. State Board of Elections*, 393 U.S. 544, 566 n.31 (1969).

> Senator Fong. . . . Mr. Attorney General, turning to section 2 of the bill . . . there is no definition of the word "procedure" here. I am a little afraid that there may be certain practices that you may not be able to include in the word "procedure." For example, if there should be a certain statute in a State that says the registration office shall be open only 1 day in 3, or that the hours will be so restricted, I do not think you can bring such a statute under the word "procedure." Could you?

> Attorney General Katzenbach. I would suppose that you could if it had that purpose. I had thought of the word "procedure" as including any kind of practice of that kind if *its purpose or effect* was to deny or abridge the right to vote on account of race or color.[8]

Admittedly, no single statement in an extensive legislative hearing can be deemed conclusive. *Allen v. State Board of Elections*, *supra*, 393 U.S. at 568-69. However, as this Court has pointed out, the Attorney General played an "extensive role" in drafting the Act and explaining its operation to Congress, *United States v. Board of Commissioners of Sheffield, Alabama*, 435 U.S. 110, 131 (1978), and because the Attorney General has broad enforcement responsibilities under the statute, his contemporaneous interpretation of the Act is "compelling" and "persuasive" and should be accorded "great deference." *Ibid.*, at 131-32; *Perkins v. Matthews*, 400 U.S. 379, 391 (1971).

It is clear from the legislative history as a whole, however, that the Attorney General's description of the scope of §2 was not off hand or ill considered. In response to questioning in both the House and the Senate on other sections of the Act, Attorney General Katzenbach consistently equated "effect" with the denial or abridgement of voting rights. *E.g.*,

> Mr. Katzenbach. . . . [a jurisdiction seeking preclearance] would have to establish . . . that those

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[8] Hearings on S. 1564 before the Committee on the Judiciary, United States Senate, 89th Cong., 1st Sess., 191 (1965) (emphasis added).

> qualifications and procedures would not have the effect of denying or abridging rights guaranteed by the 15th amendment.[9]

Similar statements are found throughout the hearings and debate in both houses equating discriminatory effect with a violation of voting rights.[10]

Not only was "effect" consistently identified with "denial or abridgement," but nowhere in the debates can any inference be drawn that either the proponents or opponents of §2 believed that it reached only purposeful discrimination.

Prior to passage of the Act, this Court had held that vote dilution could rest upon either purpose or effect. *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965) ("It might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstance of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population."). Subsequent cases reiterated this standard. *Burns v. Richardson*, 394 U.S. 73, 88 (1966); *Whitcomb v. Chavis*, 403 U.S. 124, 143 (1971); *White v. Regester*, 412 U.S. 755, 765-70 (1973); *Dallas County v. Reese*, 421 U.S. 477, 480 (1975); *Chapman v. Meier*, 420 U.S.

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[9] Hearings on H.R. 6400 before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, 89th Cong., 1st Sess., 90 (1965).

[10] 111 Cong. Rec. 10453 (Sen. Prouty), 10456 (Sen. Hart). ("He [the Attorney General] takes action [to ban the poll tax] under any circumstances where it may have the effect of denying a person his constitutional rights in respect to the opportunity to vote.").

1, 17 (1975). *See also Gomillion v. Lightfoot*, 364 U.S. 339 (1960), involving discriminatory gerrymandering of city voting lines, in which the Court focused exclusively on actual effects eschewing any requirement of proof of intent.[11] Despite the fact that purpose may be required post-*City of Mobile* for a constitutional violation, Congress obviously understood, in light of the language in the decisions of this Court, that a denial or abridgement of voting rights could result from practices which had either a discriminatory purpose or effect.

The legislative histories of the re-enactments of the Voting Rights Act in 1970 and 1975, and the 1980 Report of the Committee on the Judiciary of the House on extension of the Act, further show that the original intent of Congress was to establish a purpose or effect standard for §2.[12]

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[11] Wright v. Rockefeller, 376 U.S. 52 (1964), is not to the contrary. There, the plaintiffs had alleged only that they were the victims of intentional discrimination in redistricting. The case was decided on the issue raised, but there is nothing in the opinion that suggests only purposeful discrimination was constitutionally cognizable.

[12] The views of members of a later Congress may not be dispositive of legislative intent, International Brotherhood of Teamsters v. United States, 431 U.S. 324, 354 n.39 (1977), but as Justice Marshall has pointed out, where legislative history is sparse the Court is obligated to " '[seize] everything from which aid can be derived . . .,' . . . to reconstruct Congressional intent," including subsequent Congressional legislation touching upon the same subject matter. *Ibid.*, at 394 (concurring in part and dissenting in part). The rule is surely applicable here where the subsequent interpretations of Congress in extending and expanding the Act have been consistent and applied over a significantly long period

In 1970, Attorney General Mitchell introduced a bill on behalf of the administration to repeal §§4 and 5 and substitute in their place a provision authorizing the Attorney General to bring suit against any jurisdiction in the nation which "has enacted or is seeking to administer any voting qualification or prerequisite to voting which has the purpose or effect of denying or abridging the right to vote on account of race or color."[13] According to Attorney General Mitchell:

> Under our proposal, he [the Attorney General] could institute a lawsuit any place in the country based on a broader statutory protection of a discriminatory "purpose or effect" of a particular voting law or set of voting laws.
>
> This would make it clear to the courts that it is unnecessary to prove that the intent of the local or state officials was racially motivated.
>
> For all of these additional safeguards, we have only modified one section of the Act. State and counties would no longer be required to automatically submit all changes in their voting laws.[14]

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of time. United States v. Board of Commissioners of Sheffield, Alabama, *supra*, 435 U.S. at 135.

[13] Proposed Amendments to the Voting Rights Act of 1965: Senate Hearings S. 2507 before the Subcommittee on Constitutional Rights of the Judiciary Committee, 91st Cong., 1st and 2nd Sess., 538 (1969-70), and Proposed Amendments to the Voting Rights Act of 1965: Hearings on H.R. 4249 before the Judiciary Committee, 91st Cong., 1st and 2nd Sess. 282 (1969-70).

[14] 1970 Senate Hearings, *supra*, 189-90.

Senator Mathias opposed the amendment in the Senate hearings in part because "the power being given to the Attorney General to seek injunctive relief doesn't add anything of great substance which isn't already in the act."[15]

Senator Bayh similarly opposed the Administration's proposed amendment because it repealed the pre-clearance provisions of the Act without adding in return anything of substance to existing law.

> Senator Bayh. Very frankly I do not think you are getting any additional power that you do not now have under the 1957 and 1964 acts and under sections 2, 3, and 12 of the 1965 Voting Rights Act. I think you have these very powers.[16]

That the amendment did not alter the existing substantive standard of §2 is apparent from the objections of both Senators Mathias and Bayh that the only consequence of the proposal would be to shift the burden of proof from jurisdictions seeking to make voting changes under §5, to minorities seeking to enforce §2.[17]

The Mitchell proposal was passed by the House,[18] but was defeated in the Senate. Senators Bayh, Burdeck, Cook, Dodd, Fong, Hart, Kennedy, Mathias, Scott and Tydings introduced a substitute (the Scott-Hart Amendment) for the Administration's bill,[19] ex-

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[15] *Ibid.*, 22.

[16] *Ibid.*

[17] *Ibid.*, 197: "Senator Bayh. . . . It [the Administration's proposal] requires proof of discrimination though, does it not?"

[18] H.R. 4249, 115 Cong. Rec. 28535 (1969).

[19] Amendment No. 519, 116 Cong. Rec. 2753 (1970).

plaining that the latter would both weaken the Voting Rights Act and add nothing at all to the existing powers of the Attorney General under §2.

> 5. *Attorney General's Power to Sue Adds Nothing of Substance.* — S. 2507, after eliminating the simple enforcement procedure described above, would substitute a section authorizing the Attorney General to sue in Federal Court whenever he believes a state has enacted or is administering any voting procedure with the purpose or effect of denying the franchise on grounds of race. But the Attorney General already has the authority to bring such suits [under §§2 and 12(d)]. . . . Thus, the new section would give the Attorney General no new powers in addition to those granted by the Voting Rights Act and its predecessors. . . . Most importantly, under the present law, lawsuits with or without direct appeal are unnecessary since Section 5 preserves the status quo until legality is decided without need to resort to litigation.[20]

Seven of the ten senators thus opposing the Administration's proposal had also been sponsors of S. 1564, the bill enacted as the Voting Rights Act of 1965.

The Scott-Hart Amendment was ultimately passed in modified form by both the House and Senate.[21] The language of §2, however, was left wholly intact.[22]

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[20] Joint Views of Ten Members of the Judiciary Committee Relating to Extension of the Voting Rights Act of 1965, 116 Cong. Rec. 5523, 5527 (1970).

[21] 116 Cong. Rec. 3714, 5679 (1970).

[22] Voting Rights Amendments of 1970, P.L. 91-285, 84 Stat. 314.

In 1975, the opponents of extension of the Act introduced an amendment altering the bail out formula of §§4 and 5.[23] They contended that the new provisions would give an incentive to local jurisdictions to disestablish election mechanisms as a condition for bail out which continued adversely to affect blacks, and enact in their place "apportionment plans which . . . avoid submergence of cognizable racial or minority groups." 121 Cong. Rec. 16255-260 (1975). Congressman Rodino, a sponsor of the bill to extend the Act, H.R. 6219, opposed the new bail out because it would merely "provide the States that are now covered with a reward for saying they will live up to in the future what we believed the law required them to live up to during these past 10 years." 121 Cong. Rec. 16773. The new bail out proposal was defeated, and the substantive standard in §2 continued.

The action of the House in 1981 in voting overwhelmingly to extend the Act confirms the original intent of Congress. In response to the plurality opinion in *City of Mobile, supra*, the House, by a vote of 389 to 24, passed an amendment to §2 "restoring" the original intent of Congress that the statute reached election practices which had a discriminatory effect or result.

Prior to *Bolden*, a violation of Section 2 could be established by direct or indirect evidence concerning the context, nature and result of the practice at issue. In *Bolden*, Justice Stewart writing for the plurality, construed Section 2 of the Act as merely restating that prohibitions of the Fifteenth Amend-

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[23] H.R. Rep. 94-196, 94th Cong., 1st Sess., 73-80 (1975).

ment. The Court held that a challenged practice would not be unlawful under that section unless motivated by discriminatory intent. The Committee does not agree with this construction of Section 2 and believes that the intent of the section should be clarified.

Section 2 of H.R. 3112 will amend Section 2 of the Act to make clear that proof of discriminatory purpose or intent is not required in cases brought under that provision.

* * * *

The purpose of the amendment to Section 2 is to restate Congress' earlier intent that violations of the Voting Rights Act, including Section 2, could be established by showing the discriminatory effect of the challenged practice.[24]

The debate on H.R. 3112 further shows that the House understood that it was merely restoring the original intent of Congress.

Mr. Edwards. . . . Section 2 was designed in 1965 by this Congress to stop the maintenance by state and local governments of laws that discriminate in voting or methods of election. It does apply nationwide so the Supreme Court in 1980 was interpreting an Act of Congress and interpreted in a way that we did not intend in 1965.[25]

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[24] House Rep. No. 97-227, 97th Cong., 1st Sess., 29 (1981) (footnotes omitted).

[25] 141 Cong. Rec. 6985.

> Mr. Sensenbrenner. . . . Congress intended that the same standard of proof apply throughout the act but that different remedies would apply depending upon when the violation occurred. . . . Congress did not intend that a proof of a violation of the act would differ from section to section.[26]
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> * * * *
>
> Mr. Conyers. . . . So I encourage every member to read the report of the committee at page 29 where Attorney General Katzenbach clearly explained why specific intent was neither intended by the Congress or required to effectuate this section.[27]

This interpretation of §2 was not that of the Judiciary Committee or the House alone, but the Attorney General as well. In an *amicus* brief filed in this case in the court of appeals, the Attorney General concluded that §2 embodies a standard analogous to that in §5, and that minority plaintiffs are entitled to relief under §2 "if they . . . can establish that the challenged practices, though neutral in design, have the effect of abridging the right to vote on account of race." Brief for the United States as Amicus Curiae, 51.

Congressman Rodino commented upon the position taken by the Attorney General in the debate on the floor of the House.

> Mr. Rodino. . . I would merely like to point out that this is not just an interpretation on the part of the Judiciary Committee. The Justice Department

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[26] *Ibid.*, 6984.
[27] *Ibid.*, 6985.

took a position in the case of Lodge v. Buxton whereby it established what had originally been the intent of the Congress that where there was discriminatory effect then there was indeed a violation of section 2 of the Voting Rights Act.[28]

The legislative history of the 1965 Act, as well as the extensions of 1970 and 1975, and the proceedings in the House in 1981, all show that Congress intended to provide an effect standard in §2 in addition to banning election practices adopted or maintained for a discriminatory purpose.

(2) The Language of the Act Illuminates the Intent of Congress to Ban Voting Practices Based Upon Their Discriminatory Effect.

Section 2 prohibits the use of voting practices which "deny or abridge" the right to vote. Although the statute does not use the phrase "purpose or effect" in defining "deny or abridge," the express language of other sections of the Act demonstrates that Congress intended in §2 to describe — and prohibit — practices which had a racially discriminatory effect, as well as those which were enacted with an invidious purpose.

For example, in §3(b), setting out the standard to be used by courts in determining whether to suspend a test or device for voting, Congress defined a violation of the statute, *i.e.*, the denial or abridgement of the right to vote, as use of a test or device "for the purpose or with the effect" of discriminating. Other provisions

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[28] *Ibid.*, 6985.

of the Act, the "pocket trigger" in §3(c), §§4(a) and (d), providing for bail out by covered jurisdictions, §5, the pre-clearance requirement, §10(a), prohibiting use of the poll tax, and §202(a)(5), prohibiting durational residency requirements in presidential elections, similarly define practices which deny or abridge the right to vote as those which have a discriminatory purpose or effect.

The overall language of the Act thus discloses that when Congress used the phrase "deny or abridge" in §2, it meant to include practices which had either a discriminatory purpose or effect. Even if the language of §2 were ambiguous and subject to different interpretations, the Court would be obligated to adopt the meaning most consistent with underlying legislative policy. *Alexander v. United States Dept. of Housing and Urban Dev.*, 441 U.S. 39, 53 (1979); *Securities & Exchange Commission v. Joiner Leasing Corp.*, 320 U.S. 344, 350-51 (1943) ("courts will construe the details of an act in conformity with the dominating general purpose, will read text in the light of context and interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy.")

There can be no doubt of the underlying policy of the Voting Rights Act, nor of the requirement of this Court that its provisions be construed broadly. Because voting rights are the most important rights in a democracy, the Act should be given the "broadest possible scope" in order to achieve the goal of eliminating "the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race." *Dougherty County Board*

of Education v. White, 439 U.S. 32, 38 (1978), quoting from *South Carolina v. Katzenbach*, 383 U.S. 301, 565, 567 (1966).[29]

(3) The Act as a Whole Shows the Intent of Congress to Impose a Uniform, Nationwide Standard.

The Voting Rights Act of 1965 was a departure from prior legislative models, not because of its substantive provisions, but because of its procedure.

> First, Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution. Second: Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment. *South Carolina v. Katzenbach, supra*, 383 U.S. at 309.

Earlier laws enacted in 1957, 1960 and 1964, depended primarily on litigation for enforcement, with the burden of proof on minority plaintiffs. Unfortunately, the laws failed to insure equal voting rights.

In 1965, Congress adopted an entirely new approach, banning the practices used to exclude minorities from registration and requiring covered jurisdictions under §5 to demonstrate that any new election practices were

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[29] When Congress expanded coverage in 1975, it indicated that the Act should continue to receive the broadest construction. H.R. Rep. No. 94-196, *supra*.

not discriminatory before they could be implemented. *South Carolina v. Katzenbach*, *supra*, 383 U.S. at 315-16.[30]

Congress realized, however, that the coverage formula might be over inclusive and incorporated a provision, §4(a), allowing jurisdictions to "bail out" from §5. Congress was equally aware that not all jurisdictions in which there was a significant probability of denial of equal voting rights would meet the trigger formula of §4. These jurisdictions, as well as discriminatory voting practices beyond the reach of §5, were to be amenable to suit on a case by case basis under §§2, 3, 6 and 13.[31] Given Congressional awareness of the possibility of error in the coverage formula of §4, it is inconceivable that it nonetheless intended for a different substantive standard to apply whether voting practices were measured by §2 or §5. Senator Dirksen, in fact, repeatedly stressed the need for a uniform, nationwide standard.

> Mr. Dirksen. . . .we had section 2 there, which is the foundation for my bill, namely the 15th amendment. That is applicable anywhere at any time, regardless of what the Census Director may find, or what you may determine. That is the broad function of this bill.[32]

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[30] Covered jurisdictions include those in which "there was a high probability of pervasive racial discrimination in voting" based upon use of a "test or device" and low levels of registration or voting. United States v. Board of Commissioners of Sheffield, Alabama, *supra*, 435 U.S. at 119.

[31] 1965 Senate Hearings, *supra*, 208; House Rep. No. 439, *supra*, 13, 23-4.

[32] 1965 Senate Hearings, *supra*, 171-72.

Senator Dirksen also made it clear that non-§5 jurisdictions could not escape the Act's permanent ban on discriminatory voting procedures.

> Senator Dirksen: May I add there, actually under the broad language of section 2, you do not eliminate Texas [a non-covered jurisdiction in 1965] from this bill. The question is whether under section 2, which is almost a rephrasing of the 15th amendment, you find discrimination, denial or an abridgement of the right to vote and—
>
> Attorney General Katzenbach: Yes.
>
> Mr. Dirksen (continuing): And it states specifically that if there are procedures or qualifications Texas does not escape. It is a question of whether you can establish it.[33]

The Voting Rights Act was intended to be a comprehensive measure, covering the entire nation and reaching every practice affecting voting. "Purpose or effect" language appears in each of the Act's provisions estab-

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[33] *Id.*, at 208. The plurality in *City of Mobile*, *supra*, 446 U.S. at 60-1, citing this exchange between Senator Dirksen and Attorney General Katzenbach, dismissed the §2 claim because in its judgment "this section simply restated the prohibitions already contained in the Fifteenth Amendment." It is immaterial that the Attorney General and Congress may have been wrong in believing that §2 and the other provisions of the Act had the same reach as the Fifteenth Amendment. What *is* relevant is that Congress intended to ban practices which have a discriminatory effect, regardless of their purpose, and that it had the power to do so. City of Rome v. United States, *supra*, 446 U.S. at 177. The scope of §2 is thus unrestricted by any subsequent limitations placed by this Court on the Constitution itself in *City of Mobile*.

lishing substantive standards for judicial or administrative enforcement, §§3, 4 and 5. Section 2 was intended as a broad, general guarantee of equal voting rights, and it is illogical to assume that Congress intended for it to afford a standard of protection less than that in the parts of the Act applicable only to covered jurisdictions. Indeed, the intent of Congress from the 1965 legislative history, the histories of the amendments of 1970 and 1975, the proceedings in the House in 1981, and the language and structure of the Act, was to provide the same level of protection in §2 as the other provisions of the Act.

To hold that §§2 and 5 contain different substantive standards would actually encourage jurisdictions to retain election practices which have discriminatory results, a policy patently inconsistent with Congressional policy in enacting the Act.[34] By the same token, it would be totally illogical and inconsistent with Congressional policy to hold that identical election practices in covered jurisdictions were valid under §2 but unenforceable under §5 depending solely on when they were enacted, *i.e.*, before or after November 1, 1964, the effective date for pre-clearance under §5.[35]

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[34] The authors of the 1975 bail out amendment, *see supra*, 16, argued that §2 indeed has such an effect, a position repudiated by the Congress as a whole.

[35] Such a crazy-quilt result would obtain under the analysis of the plurality in *City of Mobile*. Thus, Wilkes County just north of Burke would be banned under §5 from electing its commission at-large since its procedures were adopted in 1972, *see* Wilkes County v. United States, 439 U.S. 999 (1978), but Burke would be permitted to elect its commissioners at-large because its plan was adopted in 1911—at a time, moreover, when blacks were wholly excluded from deciding how the government was to be elected.

The fact that a non-objection under §5 does not bar a subsequent lawsuit under §2 is further evidence that Congress intended the latter statute to cover practices which yield a discriminatory result. Assuming that the Attorney General concludes a voting change has no discriminatory purpose or effect under §5, the main reason for authorizing a subsequent suit under §2 would be to ban use of changes which later produce discriminatory effects. Senator Eastland acknowledged as much when he suggesed there was no real way to escape the substantive standard of §5, even in cases where there was no objection from the Attorney General.

> Mr. Eastland. . . .There is an escape clause in this subsection, Mr. President; oh, yes: an escape clause to the effect that even if the Attorney General fails to object and the court finds that a proposed new State law with respect to voter qualifications, for instance, will not now have the effect of denying or abridging the right to vote on account of race or color, the Attorney General is still free to bring an action the next day, if he wishes, to enjoin the enforcement of the new statute.[36]

Congress could not rationally have intended anything less than that §2 contain the same substantive standard as the other provisions of the Act.

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[36] 111 Cong. Rec. 11078; *also see ibid.*, 10861 (Sen. Stennis).

E. At-Large Elections, Numbered Post and Majority Vote Requirements in Burke County Have an Unlawful Effect in Violation of §2.

A finding of unlawful effect from use of the three voting practices challenged in this case does not depend upon a mere showing of numerical under-representation of blacks in elected office, nor does it require application of impressionistic, judicially unmanageable standards. Unlawful effect flows from objective evidence of past intentional discrimination and its continuing impact upon the present ability of minorities effectively to participate in Burke County politics.[37]

The evidence of past discrimination and its present effects found by the trial court, and affirmed by the court of appeals, was overwhelming. Blacks in Georgia were traditionally "denied access to the election process by such devices as literacy tests, poll taxes, and white primaries." JSA, 86a.[38] "Before enactment of the 1965 Voting Rights Act, Black suffrage in Burke County was virtually non-existent." *Ibid.*, 71a. The increase in black registration after the Act "clearly indicates that past discrimination has had an adverse effect on Black voter registration which lingers to this date." *Ibid.*, 72a. Moreover, "[t]he 1976 Georgia Constitution still demands a literacy and 'good character and understanding' test as a prequisite for voting, al-

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[37] It is thus unnecessary in resolving this appeal for the Court to decide whether adverse racial effect standing alone would ever violate §2.

[38] "JSA" refers to the Jurisdictional Statement Appendix.

though this provision is suspended by the 1965 Voting Rights Act." *Ibid.*, 86a n.23.

Further evidence "of present discrimination unfairly precluding Blacks from effective political participation [is] the requirement established by Ga. Code Ann. §34-605," requiring the chief registrar to be an owner of real property. *Ibid.*, 75a. The court found that "fewer Blacks than Whites are freeholders," and that "this is in part due to past discrimination, thus buttressing the Court's conclusion that Blacks are being unfairly precluded from participating in the political process." *Ibid.* The requirement that any candidate for the county commission also be a freeholder "has been continued in the law to this date." *Ibid.*, 65a n.2.

The county traditionally had only one registration site until "after a pre-trial conference before and 'friendly persuasion' by this Court." *Ibid.*, 81a. Still, "Blacks, by virtue of their relatively severe degree of poverty, the size of the county . . . and the absence of a public transportation system, are more likely than whites to have a problem physically getting to the polling places where they may exercise their most fundamental of rights." *Ibid.*, 86a.

"No Black has ever been elected to the County Commission, in spite of the fact that historically Burke County has more Blacks than Whites." *Ibid.*, 66a. A major reason blacks are unable to elect candidates of their choice to office is they have received "inferior formal education [which] has had and does now have a strong tendency to preclude Blacks' effective partici-

pation in the political process." *Ibid.*, 85a.[39] Members of the County Commission are elected by majority vote to numbered posts, and there is no residency requirement, election procedures which tend "to submerge the will of the minority and . . . enhance plaintiffs' lack of access to the system." *Ibid.*, 92a-3a. "[B]latant and pervasive denial of access" was also established by the "Commissioners' failure to appoint Blacks to the [local] committees and boards." *Ibid.*, 89a, 95a.

"Past discrimination has also chilled the opportunity for Blacks becoming involved in the Democratic Party Primary," which plays an important role in Burke County politics. *Ibid.*, 74a. The court found that "past discrimination has kept Blacks from becoming members of the Burke County Democratic Executive Committee. It was not until after this lawsuit was filed that the Executive Committee, which conducts the only party primary in the county, gained a black as one of its twenty-four members." *Ibid.*, 74a-5a.

There was "clear evidence" of racial bloc voting "ascribed in part to past discrimination." *Ibid.*, 72a.[40]

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[39] The relationship between past discrimination and present effects is unimpaired because the former may have been practiced by other officials or does not relate directly to voting. *See* Gaston County v. United States, *supra*, 395 U.S. at 290 (barring use of the literacy test in part because of prior discrimination in public education).

[40] It is not significant that bloc voting is the consequence of private choice. As this Court acknowledged in Keyes v. School District No. 1, 413 U.S. 189, 202 (1973), official discrimination has "a substantial reciprocal effect" on private choices. Nor is the relationship between past discrimination and present effects in this

Noting that there was still "virtual segregation of all social, religious, and business organizations," the court concluded that blacks were excluded "from the personal contact politics of Burke County." *Ibid.*, 89a. "[T]he result obtains that Blacks are shut out of the normal course of politics in this tightly-knit rural county." *Ibid.*, 89a. As further evidence of the exclusionary effect of at-large voting, the court noted that the first black ever elected in the county seat of Waynesboro ran from "a district with a high percentage of black residents," created as a result of a federal court order. *Ibid.*, 73a.

The court of appeals affirmed the trial court, concluding that

> historical and present discrimination operated in conjunction with the officially sanctioned electoral system to unfairly limit the access of Blacks to the political process.
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> * * * *
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> The picture that plaintiffs paint is all too clear. The vestiges of racism encompass the totality of life in Burke County. *Lodge v. Buxton*, 629 F.2d 1358, 1379, 1358 (5th Cir. 1981).

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case remote. Ninety-nine per cent of blacks and 76 per cent of whites in Burke County were born in Georgia. *Ibid.*, 83a n.18. Thus, the overwhelming majority of residents were subjected to—and continue to be affected by—the *de jure* and *de facto* discrimination found by the court to exist in Burke County.

CONCLUSION

Unless this Court deems the facts as found by the two courts below to be clearly erroneous, *Neil v. Biggers*, 409 U.S. 188, 193 n.3 (1972), it must conclude that the three challenged practices have a discriminatory effect in Burke County. If *amici* are correct that such effect is proscribed by §2, at least where it perpetuates past intentional discrimination in voting, the judgment below should be affirmed.

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